

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20544

In the Matter of)	
)	CG Docket No. 02-278
)	
<i>TSA STORES, INC Petition for Expedited</i>)	DA 05-342
<i>Declaratory Ruling with Respect to Certain</i>)	
<i>Provisions of the Florida Statutes</i>)	
)	
<i>NATIONAL CITY MORTGAGE CO. Petition</i>)	DA 04-3837
<i>for Expedited Declaratory Ruling with Respect</i>)	
<i>to Certain Provisions of the Florida Statutes</i>)	
)	
<i>CONSUMERS BANKERS ASSOCIATION</i>)	DA 04-3836
<i>Petition for Expedited Declaratory Ruling with</i>)	
<i>Respect to Certain Provisions of the Wisconsin</i>)	
<i>Statutes and Wisconsin Administrative Code</i>)	
)	
<i>CONSUMERS BANKERS ASSOCIATION</i>)	DA 04-3835
<i>Petition for Expedited Declaratory Ruling with</i>)	
<i>Respect to Certain Provisions of the Indiana</i>)	
<i>Revised Statutes and Indiana Administrative Code</i>)	
)	
<i>CONSUMERS BANKERS ASSOCIATION</i>)	DA 04-3187
<i>Petition for Expedited Declaratory Ruling with</i>)	
<i>Respect to Certain Provisions of North Dakota's</i>)	
<i>Telemarketing Rules</i>)	
)	
<i>EXPRESS CONSOLIDATION, INC. Petition</i>)	DA 04-3186
<i>for Expedited Declaratory Ruling with Respect</i>)	
<i>to Certain Provisions of the Florida Statutes</i>)	
)	
<i>AMERICAN TELESERVICES ASSOCIATION</i>)	DA 04-3185
<i>Petition for Expedited Declaratory Ruling with</i>)	
<i>Respect to Certain Provisions of New Jersey's</i>)	
<i>Telemarketing Rules</i>)	

COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these comments strongly opposing the petitions for declaratory ruling filed in the above captioned proceedings which seek to eliminate the enhanced protection States have provided

their citizens though the democratic process – a result that contravenes Congressional intent, clear precedent, and common sense.

In support of this opposition, NARUC states as follows:¹

I. NARUC’S INTEREST

NARUC is a nonprofit organization founded in 1889. Its members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications,² energy, and water utilities. Congress and the courts³ have consistently recognized NARUC as a proper entity to represent the collective interests of the State public utility commissions. In the Federal Telecommunications Act,⁴ Congress references NARUC as “the national organization of the State commissions” responsible for economic and safety regulation of the intrastate operation of carriers and utilities.⁵

¹ The comment cycle remains open for four of the captioned proceedings. For those proceedings, *i.e.* those designated by DA 05-342, DA 04-3837, DA 04-3836, and DA 04-3835, this opposition is timely as either an initial or reply comment. With respect to the three remaining dockets where the comment cycle closed before NARUC passed the resolution upon which these comments are based, NARUC, pursuant to 47 C.F.R. §§ 1.41, 1.44, 1.415(d), 1.419(b), and 1.1206(a)(1) (2004) of the Federal Communications Commission's (“FCC” or “Commission”) Rules of Practice and Procedure, respectfully requests that the FCC “authorize”, within the meaning of Section 1.415(d), these “out-of-time” comments. Alternatively, NARUC requests that, with respect to those three dockets, these comments be deemed written *ex parte* communications within the meaning of Section 1.419(b) and 1.1206 of the FCC's rules and included in the record of those proceedings.

² NARUC’s member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competing local exchange carriers (LECs). These commissions are obligated to ensure that local phone service supplied by the incumbent LECs is provided universally at just and reasonable rates. They have a further interest to encourage LECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. *See, e.g.*, 47 U.S.C. § 252 (1996).

³ *See United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff’d* 672 F.2d 469 (5th Cir. 1982), *aff’d en banc on reh’g*, 702 F.2d 532 (5th Cir. 1983), *rev’d on other grounds*, 471 U.S. 48 (1985). *See also Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

⁴ *Communications Act of 1934, as amended by the Telecommunications Act of 1996*, 47 U.S.C. §151 et seq., Pub.L.No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) (“Act” or “1996 Act”).

⁵ *See* 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon; *Cf.* 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). *Cf. NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “...Carriers, to get the

On November 22, 2002, NARUC filed comments in response to the FCC Notice of Proposed Rulemaking⁶ that was the precursor to the current FCC rules. There NARUC argued that the FCC can best leverage the deterrence impact of federal and State enforcement activity by imposing the federal "minimum" standards and allowing additional State requirements – and the associated enforcement actions and fines - to proceed against offending telemarketers. Last November, the association built on those comments with a resolution, attached as Appendix A that correctly contends:

- The United States Congress, in enacting the Telephone Consumer Protection Act (TCPA) in 1991, did not so occupy the field of interstate telecommunications so as to preempt State laws with the same objectives of protecting consumers from unwanted and oppressive telecommunications practices, whether interstate or intrastate in nature; and
- The State statutes at issue do not conflict with the TCPA insofar as it has the same objectives of protecting consumers from unwanted and oppressive telecommunications practices.

The resolution effectively urges the FCC to respect both the democratic process, common sense, and the clear reservation of State authority found in both the Statute and relevant precedent. The FCC should continue its successful policy and practice of allowing the dual State and Federal regulation and enforcement of telemarketing practices with the FCC's rules representing the minimum level of protection - leaving States free to provide their citizens with greater protections against unwarranted intrusions into their privacy. It is clear both that the States have a compelling interest in protecting consumers and promoting privacy and that Congress did not intend for the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, to preempt States' efforts to protect their residents' privacy in their homes.

cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.)

⁶ See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 02-278, 92-90, (FCC 02-250) Notice of Proposed Rulemaking and Memorandum Opinion and Order (rel. Sept. 18, 2002), 67 Federal Register 62667 (October 8, 2002) ("*Notice*").

Generally, the presumption against federal preemption is strong,⁷ and, as some federal courts have already pointed out, the federal statute simply does not state that more restrictive State laws *are* preempted.⁸ Rather it says that more restrictive intrastate requirements are NOT preempted. Specifically, Section 227(e)(1) provides: “...Nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits... the making of telephone solicitations.” Indeed, even the FCC has noted that: “Nothing that we do in this order prohibits States from enforcing State regulations that are consistent with the TCPA and the rules established under this order in state court.”⁹

NARUC specifically endorses and supports all arguments filed in these proceedings that oppose the petitions filed by industry groups intent on calling people that have decided that they do not want to receive the communication – people that took the time and energy to register that choice by affirmatively opting in to not just the Federal program, but also to the greater protections afforded by the respective State regimes.

CONCLUSION

In any democracy, policy makers must pay careful attention to what the people they represent want. It is telling that, the forty four States that enacted these rules found immediately that they were enormously popular. So much so that Congress followed the State lead and required the FTC and the FCC to create a national program. Moreover, the efficacy of both the

⁷ See, *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 879-80 (8th Cir. 2002)

⁸ See, e.g., *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995). It is possible for federal law to preempt state law by implication, but the TCPA does not carry such an implication. In this case, the court stated: “If Congress intended to preempt other State laws, that intent could easily have been expressed as part of [the savings clause].” *Id.* at 1547-48.

⁹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, (July 3, 2003) at ¶85.

State and Federal enactments cannot be denied. The FCC made the right choice in the initial rules. Where (1) the statutory text clearly allows, and NARUC would argue, requires the FCC to respect right of States as sovereigns to exercise police power to provide additional protections for their citizens their citizens, (2) there is no question that the cited States' elimination of the unwanted and oppressive practices outlined in the seven industry petitions filed in this docket has undeniable and wide support by the electorate in the States where those laws are in effect, and (3) the State enforcement activities in those jurisdictions has a symbiotic relationship to the success and efficacy of the federal program, the FCC continue the course generally outlined in its original rules. NARUC urges the FCC to continue to do as Congress intended, i.e., allow dual State and Federal regulation of telemarketing practices and allow the States to impose measures that provide their citizens with greater protection from unwarranted intrusions by commercial interests.

Respectfully submitted,

/S/

James Bradford Ramsay
GENERAL COUNSEL

National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, NW
Suite 200
Washington, DC 20005

Phone: 202.898.2207
Facsimile: 202.898.2213
E-mail: jramsay@naruc.org

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Appendix A – November 2004 Resolution

Resolution Concerning Petitions filed at the Federal Communications Commission by Telemarketers Requesting Preemption of State Telemarketing Protection Laws

WHEREAS, Recently three petitions were filed with the Federal Communications Commission (“FCC”) by telemarketing companies asking the FCC to preempt the North Dakota, Florida and New Jersey State telemarketing laws applicable to interstate calling; *and*

WHEREAS, The petitions (DA 04-3185, DA 04-3186 and DA 04-3187) argue that the State laws are more restrictive than the federal law and should be preempted as applied to interstate telemarketing calls thereby eliminating a level of consumer protection found necessary by State governments; *and*

WHEREAS, The National Association of Regulatory Utility Commissioners (NARUC) is a non-profit organization consisting of the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands whose missions is to serve the public interest by improving the quality and effectiveness of public utility regulation; *and*

WHEREAS, NARUC recognizes the enormous popularity and efficacy of the forty-four States that have enacted laws to protect its citizens from unwanted and oppressive telecommunications practices, such as those addressed in the said petitions; *and*

WHEREAS, NARUC recognizes that the fundamental right of States as sovereigns to exercise police power for the protection and welfare of their citizens is guaranteed by the Constitution of the United States of America; *and*

WHEREAS, The United States Congress, in enacting the Telephone Consumer Protection Act (TCPA) in 1991, did not so occupy the field of interstate telecommunications so as to preempt State laws with the same objectives of protecting consumers from unwanted and oppressive telecommunications practices, whether interstate or intrastate in nature; *and*

WHEREAS, The North Dakota, Florida and New Jersey statutes at issue do not conflict with the TCPA insofar as it has the same objectives of protecting consumers from unwanted and oppressive telecommunications practices; *and*

WHEREAS, NARUC opposes any effort by telemarketing companies to diminish the protections provided by duly enacted State consumer protection laws before the FCC; *and*

WHEREAS, NARUC urges the FCC to continue its successful practice of allowing the dual State and Federal regulation of telemarketing practices with the federal regulations representing the floor of protection and leaving States with the ability to enact more stringent laws if the public necessity requires it, *now therefore be it*

RESOLVED, That the National Association of Regulatory Utility Commissioners (NARUC), convened in its 2004 Annual Convention in Nashville, Tennessee, supports the Constitutional right of States, such as North Dakota, Florida and New Jersey, to enact legislation to effectively regulate telecommunications practices affecting its citizens, and recommends that the FCC not

overstep its Congressionally-mandated authority and unnecessarily impinge upon the States' rights to self-governance; *and be it further*

RESOLVED, That NARUC urges that any order resulting from these proceedings should not preempt States from establishing or enforcing consumer protection regulations in the area of telecommunications; *and be it further*

RESOLVED, The NARUC General Counsel is directed to file comments in each of the petitions and take any appropriate action to further the intent of this resolution.

Sponsored by the Committee on Consumer Affairs
Adopted by the NARUC November 17, 2004

Appendix B – NARUC's February 2002 Resolution

Resolution Concerning the FTC Notice of Proposed Rulemaking to Amend the Telemarketing Sales Rule, 16 CFR PART 310

WHEREAS, The National Association of Regulatory Utility Commissioners (NARUC) recognizes the Federal Trade Commission's (FTC) desire and interest to amend the Telemarketing Sales Rule, 16 CFR Part 310, and requests public comment by March 29, 2002 on the proposed changes; and

WHEREAS, The FTC's stated objective in the proposed rulemaking is to prohibit specific deceptive and abusive telemarketing acts and practices and to establish a national "do not call" registry for a two year trial period; and

WHEREAS, NARUC recognizes that despite the success of the existing Rule in correcting many of the abuses and bad practices in the telemarketing industry, complaints about abusive telemarketing practices continue to be filed with the offices of consumer groups, law enforcement agencies and State utility commissions in large numbers; and

WHEREAS, The escalating number of consumers upset with receiving unwanted telephone solicitations is further exemplified by the phenomenal growth in the Direct Marketing Association's ("DMA") list, which has grown to 4 million, increasing by 1 million since June 2000; and

WHEREAS, Consumers' continued frustration over receiving unwanted telephone solicitations at home have prompted twenty (20) States to pass "do-not-call" statutes as of January, 2002, and numerous other States are considering enacting similar laws that would create State-run "do-not-call" registries; and

WHEREAS, States that have enacted "do not call" legislation have gone to great financial expense in the implementation, operation and enforcement of their respective programs; and

WHEREAS, The FTC has requested comments as to whether its proposed rules should pre-empt State "do not call" statutes to the extent that the national "do not call" registry would provide more protection to consumers; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its February 2002 Winter Meetings in Washington, D.C, urges all State Commissions to file comments on the FTC's notice of rulemaking; *and be it further*

RESOLVED, That the NARUC General Counsel shall file comments with the FTC on behalf of NARUC in conformance with this Resolution; *and be it further*

RESOLVED, NARUC urges the FTC to strengthen protections against unwanted telemarketing activity, including establishment of a national "do not call" registry, so long as these protections serve as nationwide minimum standards which do not preempt State regulations which provide greater protection to consumers and that the national registry incorporates existing "do not call" lists; *and be it further*

RESOLVED, That NARUC respectfully requests that no action be taken by the FTC concerning the establishment of a national "do-not-call" registry that would diminish, harm or place additional financial burdens upon the existing State "do not call" registries.

Sponsored by the Consumer Affairs Committee

Adopted by the NARUC Board of Directors on February 13, 2002